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8 UNITED STATES DISTRICT COURT  
9  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 OAKLAND DIVISION

12 RODNEY JAMAAR-DIONE SMITH

13 Plaintiff,

14 v.

15 FORMER DEPUTY J. COOPER, FORMER  
16 DEPUTY Z. L. GRIFFITH, FORMER  
DEPUTY G. MORA, SANTA RITA COUNTY  
JAIL,

17 Defendants.

Case No.: 4:09-cv-2263-SBA

**NOTICE OF MOTION AND MOTION  
FOR SUMMARY JUDGMENT; AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

Judge Sandra Brown Armstrong

18  
19 TO PLAINTIFF RODNEY JAMAAR-DIONE SMITH, in *pro se*:

20 PLEASE TAKE NOTICE that Defendants (Former Deputy) J. COOPER and DEPUTY G.  
21 MORA move for summary judgment on the grounds that there is no genuine issue of material fact and  
22 that defendants are entitled to judgment as a matter of law.

23 This motion is based on this notice, the memorandum of points and authorities, the declaration  
24 of Lynne G. Stocker and the exhibits thereto, the Declaration of Sgt. Mark Foster and the exhibit  
25 thereto, all pleadings and papers on file in this action and upon such other matters as may properly come  
26 before the Court.  
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1 Dated: July 13, 2011

ANDRADA & ASSOCIATES

2 /s/ Lynne G. Stocker

3 By

4 LYNNE G. STOCKER  
Attorneys for Defendants  
5 G. MORA AND J. COOPER  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION AND SUMMARY OF ALLEGATIONS

Plaintiff, who is currently incarcerated at Santa Rita Jail, has filed a *pro se* civil rights action pursuant to 42 U.S.C. § 1983 alleging that Defendants used excessive force against him and were deliberately indifferent to his serious medical needs.

Plaintiff alleges that while he was serving "9 month on bogus charges," he was subjected to excessive force by Defendants Cooper, Griffith [sic] and Mora in 2005.<sup>1</sup> Specifically, Plaintiff alleges that Defendant Cooper "instigated a conflict in which he [was taken] advantage of . . . ." (Complaint at 3.) Defendant Cooper "ordered [Plaintiff] out of [his] cell 3-4 hours post an argument." (*Id.*) When Plaintiff "emerged" from his cell, he saw the "majority of the deputy's [sic] on that watch lying in wait in full combat uniform." (*Id.*) Plaintiff claims that Defendant Cooper "asked [him] to cuff up when [he] obliged [Defendant Cooper] yelled stop resisting and it was mayhem after that all [he] remember[s] is waking up in a cell, then a brief medical escort to the nurse." (*Id.*) Plaintiff alleges that he was "heckled into another verbal dispute in cuffs still and [Defendants] took the liberty to assault [him] again . . . with weapons and unnecessary [sic] violence on the trip to ad-seg with Z. L. Griffith and G. Mora in which [he] was beat unrelentlessly." (*Id.*) Plaintiff claims he was "charged w/battery before they dropped [the] case." (*Id.*) Plaintiff also alleges that he was not given medical treatment "after [the ] second assault." (Complaint at 4.)

This Court has found cognizable Plaintiff's claims for excessive force and for deliberate indifference to his medical needs as against Defendants J. Cooper, G. Mora and Z.L. Griffith. [Order of Service, Docket 8] Only Defendants J. Cooper and G. Mora have been served with process and have appeared in this action.

### II. STATEMENT OF ISSUE TO BE DECIDED

1. Whether there is a genuine issue of material fact that Plaintiff's action is barred by the applicable statute of limitations.

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### III. STATEMENT OF FACTS

Plaintiff alleges that on August 1, 2004, he was involved in an altercation, and that excessive force was used against him, by deputies J. Cooper and G. Mora at Santa Rita Jail. Plaintiff filed a grievance pertaining to the incident on August 8, 2004. [Plaintiff's Depo: 74:4-75:16 and Ex. 1 thereto (Ex. A and B to Stocker Decl.)] Nearly five years later, Plaintiff filed his complaint on May 21, 2009 (Complaint, Docket 1) pertaining to these events. [Plaintiff's Depo. 12:20-13:8]

At the time of the alleged incident, Plaintiff was incarcerated at Alameda County's Santa Rita Jail. (Complaint at 2) Plaintiff is currently incarcerated at Santa Rita Jail on charges of sexual battery. A trial on those charges is currently set for August 15, 2011. [Plaintiff's Depo. 8:17-9:1]

### IV. STANDARD ON SUMMARY JUDGMENT

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed.R.Civ.P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.1987).

There is no genuine issue of fact if, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita, 475 U.S. at 587.

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

### V. ARGUMENT

#### A. PLAINTIFF'S ACTION IS BARRED BY THE STATUTE OF LIMITATIONS

It is fundamental that the primary purpose of statutes of limitation is to prevent the

<sup>1</sup> The alleged incident actually occurred in 2004. [Plaintiff's Depo. 74:4-20; Ex. 1]

1 assertion of stale claims by plaintiffs who have failed to file their action until evidence is no longer  
 2 fresh and witnesses are no longer available. The right to be free of stale claims in time comes to  
 3 prevail over the right to prosecute them. [Citations.] The statutes, accordingly, serve a distinct public  
 4 purpose, preventing the assertion of demands which through the unexcused lapse of time, have been  
 5 rendered difficult or impossible to defend. Addison v. State of California, 21 Cal.3d 313, 317 (1978).

6 For actions under 42 U.S.C. § 1983, courts apply the forum state's statute of limitations for  
 7 personal injury actions, along with the forum state's law regarding tolling, including equitable tolling,  
 8 except to the extent any of these laws is inconsistent with federal law. Fink v. Shedler, 192 F.3d 911,  
 9 914 (9th Cir.1999). At the time Rodney Smith filed his lawsuit, California's statute of limitations for  
 10 personal injury actions was two years. Maldonado v. Harris, 370 F.3d 945, 955 (9th Cir. 2004).  
 11 [Effective January 1, 2003, the California statute of limitations for assault, battery, and other  
 12 personal injury claims is two years instead of one. Cal.Civ.Proc.Code § 335.1] Federal law  
 13 determines when a civil rights claim accrues. Elliott v. City of Union City, 25 F.3d 800, 801-802 (9<sup>th</sup>  
 14 Cir. 1994). A claim accrues when the plaintiff knows or has reason to know of the injury which is the  
 15 basis of the action. Kimes v. Stone, 84 F.3d 1121, 1128 (9th Cir.1996). Clearly, the claim accrued no  
 16 later than the date of the incident or the date that Plaintiff filed his grievance.

### 17 **B. TOLLING PROVISIONS DO NOT PREVENT BAR OF STATUTE**

18 Plaintiff knew or had reason to know of the injuries that form the basis of the present action  
 19 in August, 2004, the time of the subject events. Plaintiff did not file the present action until May,  
 20 2009. Consequently, the two year statute of limitations bars the present action unless the limitations  
 21 period may be extended or unless the running of limitations has been tolled sufficiently to permit the  
 22 present action to go forward. California law provides for the tolling of a statute of limitations for a  
 23 period of up to two years based on the disability of imprisonment, applicable to plaintiffs  
 24 “imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term  
 25 less than for life.” Cal.Civ.Proc.Code § 352.1. Even assuming that Mr. Smith was incarcerated at the  
 26 time that the civil rights claim accrued (thus, tolling the statute until July 31, 2006), the two year  
 27 tolling period is insufficient to prevent summary judgment where the complaint was not filed until  
 28 May 21, 2009.

California law further provides that the statute of limitations is tolled while a prison inmate exhausts administrative remedies, a mandatory prerequisite to filing a federal civil rights action. *See, Brown v. Valoff*, 422 F.3d 926, 943 (9<sup>th</sup> Cir.2005). However, Mr. Smith's grievance was completed, and his administrative remedies exhausted, on August 10, 2004, nine days after the incident when the grievance was denied at the final level. [Ex. A to Declaration of Sgt. Mark Foster]

### C. THE ENTIRE ACTION SHOULD BE DISMISSED

The entire action should be dismissed, even though there exists an unserved Defendant who has not yet appeared in the present action. This Defendant, who would be represented by the same counsel representing moving Defendants, reasonably may be expected to raise the bar of limitations. *Cf. Columbia Steel Fabricators v. Ahlstrom Recovery*, 44 F.3d 800 (9th Cir.), *cert. denied*, 516 U.S. 864 (1995) (permitting summary judgment in favor of nonappearing party, where appropriate). Plaintiff has not yet complied with this Court's order to provide the required information necessary to locate Defendant Griffin. [Docket 32] Continuance of the Marshal's efforts to serve belatedly the unserved defendant thus would serve no useful purpose. *Parker v. Marcotte*, 975 F.Supp. 1266, 1272, fn. 4 (C.D. Cal., 1997) *rev'd mem.*, 198 F.3d 254 (9th Cir.1999).

### VI. CONCLUSION

For the reasons discussed herein, the applicable statute of limitations bars the present action. This fundamental defect cannot be cured by amendment. Therefore, the Court should dismiss the present action with prejudice.

Dated: July 13, 2011

ANDRADA & ASSOCIATES

By /s/ Lynne G. Stocker  
 LYNNE G. STOCKER  
 Attorneys for Defendants  
 G. MORA and J. COOPER

**U.S.D.C., Northern District of California, Case No. 4:09-cv-2263-SBA**

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